(3)

No. 03-906

Supreme Court, U.S.
FILED
MAR 19 2004
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

Richard O'Brien,

Petitioner

vs.

City of Hackensack

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING DENIAL OF PETITION FOR WRIT OF CERTIORARI

Michael P. Hrycak
Counsel of Record

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Westfield, New Jersey 07090
(908) 789-1870

INTRODUCTION

Petitioner asks this Court to consider the false and pretextual reasons asserted by a public employer after a course of discriminatory conduct against a rehabilitated employee to establish liability under the ADA for his wrongful termination and loss of career as a firefighter.

The employer decided to terminate O'Brien upon learning of his involvement with rehabilitation. The employee had no prior disciplinary record at the time he admitted his disability in January, 1995. However, by December, 1995 his employer found that after sixty days back on duty he "is again found to be in possession of a controlled dangerous substance" (Ja235). The only disciplinary record is one that was created in the meantime, including the arrest of O'Brien which was known ahead of time by the employer. From January, 1995 Hackensack discriminated against O'Brien solely due to his cross addiction disability, while he undisputedly stayed on the path of rehabilitation and sobriety.

A recently published New Jersey State Court opinion specifies that a public employee is entitled to a hearing if there is a material fact in dispute, including representation, cross-examination of adverse witnesses and presentation of witnesses on the employees behalf. Additionally, internal correspondence proves: (1) the employer never intended in honoring the parties' settlement agreement: (2) the employer knew beforehand of the arrest of the employee for the purpose of his subsequent termination; (3) an arrest warrant is still pending from this matter for failure to appear, although this matter was concluded before the March 27, 1997 disciplinary hearing and was at the core of employer's termination action.

Appendix A - Copy of Warrant to arrest Richard O'Brien, issued by Bergenfield Municipal Court for failure to appear for violation of N.J.S.A. 39:3-40 (Driving While Driver's License Suspended).

Appendix B1 - Interoffice Memorandum from Chief Richard Johnson to all Platoon Commanders, dated October 13, 1995.

Appendix B2 - Memorandum from Gordon A. Sieck, Personnel Director to Chief Richard Johnson, dated December 7, 1995.

Appendix B3 - Interoffice Memorandum from Chief Richard Johnson to Deputy Chief R. Yannelli, dated December 8, 1995.

Appendix C - Letter by Dr. C. Choi, dated December 10, 2003 diagnosing Richard O'Brien with PTSD related to past trauma as firefighter.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR REHEARING FOR
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

O'BRIEN WAS DEPRIVED OF A PROPER HEARING BEFORE HIS EMPLOYER TERMINATED HIM SOLELY DUE TO HIS DISABILITY STATUS

A recently published opinion[1] by the Superior Court of New Jersey, Law Division has held that even for minor discipline[2] when a material fact is in dispute:

> the officer is entitled to representation, to cross-examine any witnesses who may be called to testify against him or her and to present witnesses on his or her behalf. A material fact is defined as a fact legally consequential to a determination of an essential issue in a case. Black's Law Dictionary 881 (5th ed. 1979). Where a material fact is an issue, it is essential that the hearing officer be afforded the opportunity to consider the testimony of witnesses and to have the testimony tested by cross-examination to determine where the truth lies. Such a procedure promotes confidence in the integrity of the process. Fraternal Order of Police Lodge #1 Camden v. City of Camden

[1] although decided October 22, 2003, this opinion was approved for publication February 9, 2004 and digested in the March 8, 2004 issue of New Jersey Law Journal, 175 N.J.L.J. 1020

[2] minor discipline consists of a fine or suspension of five days or less, the equivalent provision in this case is N.J.A.C. 4A:2-3.1(a) "Minor discipline is a formal written reprimand or a suspension or fine of five working days or less"

BEST AVAILABLE COPY

Police Department, ___ N.J.Super. ____ (Law Div., 2004) Lexis at 13, 14

The hearing officer in this matter decided O'Brien's termination only upon documentary evidence without a single fact witness: "I have reviewed the transcript. The proof of Firefighter O'Brien's guilt is overwhelming." Petition at 17, 18. The city's case was presented through one witness, Gordon Sieck, the personnel director (reply brief, page 5). His only testimony (March 27, 1997 transcript, pages 54-65) was to describe the Preliminary Notices of Disciplinary Action that he prepared. Then, the labor attorney, Raymond Wiss, read excerpts from the July 25, 1996 and November 5, 1996 municipal court transcripts into the record (pages 66-79), with Sieck's cross examination (pages 79-95) and redirect (pages 95-96). Mr. Sieck had no personal knowledge of O'Brien's arrest, municipal trial or whether he had been attending rehabilitation treatment or conditions of the dismissal of those charges (reply brief, page 5).

Mr. Sieck is also the author of the letter included as Appendix B2 which on December 7, 1995 advised the fire chief: "Mr. Naylis has advised me that the mechanics are in place for Richard [O'Brien] to be arrested by the Bergenfield Police Department this weekend for the possession of drugs. This arrest will eliminate Richard from any of the protection of the ADA he has enjoyed up to now." Appendix B2.

The employee is also entitled to "disclosure of the evidence..." Fraternal Order of Police, *supra*, at 12, citing Nicoletta v. N. Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 165 (1978). Richard O'Brien's legal counsel was presented with the Municipal Court transcripts thirty minutes before his disciplinary hearing on March 27, 1997, Petition at 17. These transcripts were stipulated to only on the condition that Officer Casper testify. The city refused to produce the witness after the transcripts were placed into evidence by the city manager LaCava.

The hearing officer used the transcripts of the proceeding to make findings regarding all the disputed facts: (1) the reason for the motor vehicle stop; (2) the arrest of O'Brien; and (3) the subsequent search of O'Brien's jacket leading to the alleged

discovery of the burnt marijuana stubs. Petition at 18.

O'Brien has disputed all three of these allegations. See Reply Brief, pages 4-7.

(1) O'Brien was stopped because Officer Casper of the Bergenfield Police Department suspected him of driving while suspended and outstanding warrants, Transcript of July 25, 1996 proceedings, Ja 214.

(2) Although the officer arrested O'Brien and issued a ticket for driving while suspended, Ja 223, that charge was dismissed, as well as no warrants were found. However, as Appendix A states, the driving while suspended warrant for arrest is still active today and being pursued by Bergenfield Municipal Court for the underlying matter that was concluded almost seven and a half years ago.

(3) Although the arresting officer testified, in the municipal court proceeding, that he searched O'Brien after arriving at the police station, there was a prior field search where O'Brien was directed to turn all his pockets inside out. Additionally, the officer searched his jacket, and all his garments, outside of his presence at the police station where the cigarette box with burnt marijuana butts were found. To this date O'Brien has never had these butts or the box presented, neither in the municipal court proceeding (although this evidence together with the station video monitor tape were subpoenaed but production was refused by the police-reply brief, page 6), nor at the disciplinary hearing. O'Brien was deprived his constitutional and lawful right to cross examine the police officer. Officer Casper's testimony at the municipal court hearing was accepted by the hearing officer.

HACKENSACK IMMEDIATELY RENEGED AFTER ENTERING INTO A SETTLEMENT AGREEMENT ON OCTOBER 13, 1995, WITH THE INTENT TO HAVE O'BRIEN DISMISSED DUE TO HIS ADDICTION

After the parties agreed to a settlement, first at an October 5, 1995 meeting (transcript Ja183-189), and confirming their respective responsibilities on October 13, 1995 (transcript Ja192-199), Fire Chief Richard Johnson, on that same day,

issued the following directive to his platoon commanders:

> As you are aware F/F O'Brien has been successful in his attempt to returne [sic.] to duty with this department. I will not allow this or any other drug addict on my Fire Department, I don't care how good a fire fighter he is. As of this moment I want all officer[s] to begin to file disciplinary charges against Mr. O'Brien for all presumed infractions of this Department[']s rules and regulations however minor an offense it may be. This disciplinary action must NOT fall under the protection of the americans with disabilities act. I want this individual off my department before Christmass[sic.] Appendix B1

Although at the time O'Brien had no knowledge of such a directive, it merely continued the course of discriminatory conduct by Hackensack since his plea for help with his disability in December, 1994. As his employer conceded, O'Brien had no disciplinary problems prior to this time:

> I accept further that Mr. O'Brien's personnel file is free of prior disciplinary problems, and that he has been trying to deal with his drug abuse problem by seeking medical help and therapy. I also accept that two recent drug tests were negative for drugs. City Manager LaCava April 18, 1995 findings, Ja165

By the time that Hackensack reinstated O'Brien in October 20, 1995; he had been kept off active status by the city for eleven months, since December, 1994. During the period of his suspension Hackensack attempted to charge him with conduct unbecoming a public employee (June 20, 1995). After a hearing on August 3, 1995 (which confirmed that all charges had been dismissed by the municipal court) on August 20, 1995 Hackensack alleged that O'Brien was not attending rehabilitation (for which no hearing was ever held). The October, 1995 settlement was agreed to by Hackensack only because O'Brien had filed an appeal and EEO complaint. The Third Circuit found that during this period Hackensack made no effort to fund or help with O'Brien's rehabilitation:

> The City agreed to help O'Brien secure and fund an

outpatient therapy program. However, the City later shifted the burden back to O'Brien to find outpatient treatment on his own. Petition, App. A, page 6.

Next, the upcoming arrest of O'Brien, on December 9, 1995 was confirmed by internal Hackensack correspondence, dated December 7, 1995. First, Sieck, personnel director, wrote a letter to Chief Johnson advising him that:

> Mr. Naylis has advised me that the mechanics are in place for Richard [O'Brien] to be arrested by the Bergenfield Police Department this weekend for the possession of drugs. This arrest will eliminate Richard from any of the protection of the ADA that he has enjoyed up to now.... When faced with the arrest in Bergenfield, the isolation from his children and the union, the harassment by Prisci in family court, and the arrests for child support by our friend in the sheriffs department. A drug addict with as serious an addiction problem as Richard had will return to the active use of drugs to deal with the stress. When this happens, Richard will kill himself with the drugs. If it is done this way no one will ask any question or even care. Appendix B2

However, it is the next two actions by Chief Johnson that make the December 9, 1995 arrest of O'Brien even more dubious. Initially, on December 8, 1995, Chief Johnson issued an interoffice communication to Deputy Chief Yannelli:

> Please be informed that as a result of F/F O'Brien's arrest by the Bergenfield Police for possession of CDS in a motor vehicle, F/F O'Brien is suspended from duty pending removal. This suspension will take effect immediately and as such F/F O'Brien is prohibited from entering any and all Fire Department facilities or having any contact with any employee of this Department. Appendix B3

This communication was issued on Friday, December 8, 1995, the day before the Saturday, December 9, 1995 arrest. It also reaffirmed the intent of isolating O'Brien from his fellow fire fighters and union members while he was fighting for his job

and career.

Next, the Fire Chief issued a Preliminary Notice of Disciplinary Action based upon conduct unbecoming a public employee for possession of CDS in motor vehicle and insubordination and failure to comply with order, reply brief, page 10. This notice was issued on the Monday morning, December 11, 1995 following the Saturday night arrest. These actions, both individually and collectively, support an intent to terminate O'Brien for his addiction, contrary to the finding of the Third Circuit:

> No one could reasonably conclude, on this record, that O'Brien was terminated for his addiction, rather than for the misconduct of drug use and possession. Petition, App. A, page 7

Hackensack's actions support a finding of O'Brien's termination due to his addiction, thereby satisfying the requirements for a prima facie case under the ADA.

O'BRIEN HAS RECENTLY BEEN DIAGNOSED WITH PTSD RELATED TO HIS EXPERIENCE AS A FIRE FIGHTER, CONFIRMING HIS DISABILITY STATUS

After the petition was filed with this Court, O'Brien was diagnosed at the Veterans Affairs Medical Center in Philadelphia, Pennsylvania with Post Traumatic Stress Disorder (PTSD), directly related to "past trauma as a firefighter" Appendix C. Richard O'Brien has qualified for Veterans Affairs treatment due to his prior service in the United States Navy. However, the physician concluded on December 10, 2003 that O'Brien is under her care due to PTSD.

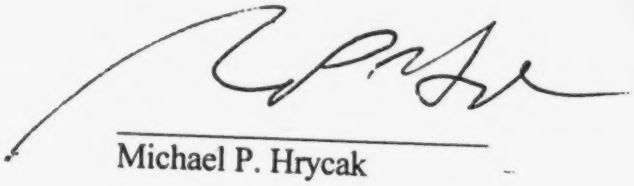
For the first time this may explain Richard O'Brien's cross addiction for which the protection of the ADA is sought. It is respectfully submitted on rehearing that a plaintiff must be accorded a full and fair opportunity to present the underlying facts to establish wrongful termination by an employer due to an employee's disability. This case underscores the special problem being faced by first responders, they are public employees that cannot be terminated except for cause.

However, when the circumstances of their duties cause, or contribute, to the existence of a disability such as O'Brien's, they need to be able to approach their employers for assistance. Otherwise, we will lose these important members that selflessly and regularly are depended upon by the public to help and rescue them from disasters, natural and manmade. This discrimination concluded with a hearing that was inadequate even for minor discipline, but it terminated a career. O'Brien, like many others that have not been able to avail themselves of the ADA for protection, continue to live a substandard life as a result of this discrimination that will not end without their chance to vindicate themselves and their actions in an adjudicative proceeding. Otherwise, they have lost everything, as O'Brien has.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



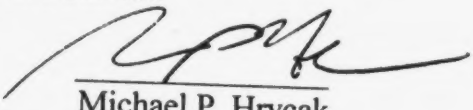
Michael P. Hrycak

Dated: March 19, 2004

Certification IAW Supreme Court Rule 44.2

I, Michael P. Hrycak hereby certify that this petition for rehearing is restricted to intervening circumstances or other substantial grounds not previously presented and is presented in good faith and not for delay. I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 19, 2004



Michael P. Hrycak

TFF00169

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* C O P Y O F W A R R A N T *
****

02/21/01
07:30

WARRANT NO: 37836
TICKET NO: 037836

POLICE AGENCY: 0203
BAIL AMOUNT: 500.00
DATE WARRANT ISSUED: 02/07/2001

M/C PHONE #: 201 387-4055
VIOLATION: 39:3-40

TO ANY POLICE OFFICER:
YOU ARE HEREBY COMMANDED TO ARREST THE DEFENDANT WHOSE NAME AND ADDRESS ARE SHOWN BELOW AND BRING HIM/HER BEFORE THIS COURT TO ANSWER A COMPLAINT(S) CHARGING AN OFFENSE(S) IN THE JURISDICTION OF THIS COURT OR HOLD THE DEFENDANT TO BAIL BEFORE AN AUTHORIZED OFFICIAL IF AN AMOUNT OF BAIL IS SHOWN ABOVE.

RICHARD OBRIEN
140 HIGHGATE TERR

BERGENFIELD NJ 07621 3922

DLN: 010676550007574
DOB: 07/00/1957 EYES: A SEX: M

BY ORDER OF JUDGE
LYNN S MULLER
BERGENFIELD
198 N WASHINGTON AVE

BERGENFIELD NJ 07621

AUTHORIZED BY
LYNN A JACOBY

REASON FOR WARRANT: FAILURE TO APPEAR
PF1 - EXECUTE WARRANT PF2 - WARRANT HISTORY

Appendix A

BACKENSACK FIRE DEPARTMENT

OFFICE OF THE CHIEF

TO: All Platoon Commanders

FROM: Fire Chief Richard Johnson

DATE: October 13, 1998

SUBJECT: Fire Fighter O'Brien

As you are aware F/F O'Brien has been successful in his attempt to returne to duty with this department. I will not allow this or any other drug addict on my Fire Department, I don't care how good a fire fighter he is. As of this moment I want all officer to begin to file disiplinary charges against Mr. O'Brien for all presumed infractions of this Departments rules and regulations however minor an offense it may be.This disciplinary action must NOT fall under the protection of the americans with disabilities act. I want this individual off my department before Christmass.

By Order of
Richard Johnson, Chief
Commanding

Deputy Chief R. Carucci
Deputy Chiefs 1, 2, 3, 4
Information Management

Appendix B1

CITY OF HACKENSACK
65 Central Avenue
P.O. Box 608
HACKENSACK, N.J. 07602-0608
(201) 646-3905
Fax # (201) 646-8032

GORDON A. BIECK
EXECUTIVE ASSISTANT
PERSONNEL DIRECTOR

CITY COUNCIL
JOHN P. ZISA, MAYOR
JUANITA TRANSHILL
DEPUTY MAYOR
MARK A. STEIN
ROGER S. MATTEI
JOSE R. GALVIS

December 7, 1995

Mr. Johnson:

Karen has informed me that Mr. Jordan and company has made another attempt to scare Mr. O'Brien away by having him ruffed up. I have also been informed that this latest attempt erupted into an extremely violent confrontation in which all three of the thugs sent after Mr. O'Brien received serious injuries. This development is both dangerous and unnecessary. I will again echo Prisci's warnings about pushing Richard into any physical confrontation, (Rick is an extremely dangerous man when pushed into a fight, he grew up on the streets and is an exceptional street fighter), this mans ability to fight is augmented by several years of studying martial arts. These attempts to scare Mr. O'Brien off are dangerous and stupid and must cease immediately.

Mr. Naylis has advised me that the mechanics are in place for Richard to be arrested by the Bergenfield Police Department this weekend for the possession of drugs. This arrest will eliminate Richard from any of the protection of the ADA that he has enjoyed up to now. Mr. Jordan needs to focus his attention to the task of eliminating any of Richard's support within the union and to ensure that his friend Johanna continues to prevent Richard and Prisci from communicating. Richard must not be permitted to establish Prisci's personal involvement with any employee of this City.

When faced with the arrest in Bergenfield, the isolation from his children and the union, the harassment by Prisci in family court, and the arrests for child support by our friend with the sheriffs department. A drug addict with as serious an addiction problem as Richard had will return to the active use of drugs to deal with the stress. When this happens, Richard will kill himself with the drugs. If it is done this way no one will ask any question or even care.

Gordon A. Bieck
Executive Assistant/
Personnel Director

Appendix

BC

CITY OF HACKENSACK

INTEROFFICE COMMUNICATION

DATE: December 8,1995

MEMO TO: Deputy Chief R. Yannelli

FROM: Richard Johnson, Fire Chief

SUBJECT: Fire Fighter R.O'Brien

Please be informed that as a result of F/F O'Brien's arrest by the Bergenfield Police for possession of CDS in a motor vehicle,F/F O'Brien is suspended from duty pending removal.This suspension will take effect immediately and as such F/F O'Brien is prohibited from entering any and all Fire Department facilities,or having any contact with any employee of this Department

RJ:daj

CC: Gordon Sieck, Executive Asst/Personnel Dir
Russell Shorter, President IAFF Local 2081

Appendix B3

B3

DEPARTMENT OF VETERANS AFFAIRS
Medical Center
University and Woodland Avenue
Philadelphia PA 19104

In Reply Refer To

To whom it may concern; 12/10/03

This is to inform you that Mr. Richard OBrien (soc sec 135-56-8102) is under my care at the Philadelphia VA Hospital Mental Health Clinic for a diagnosis of PTSD related to past trauma as a firefighter. Although this is Not a service-connected condition, Mr. O'Brien is totally disabled and unemployable due to this diagnosis and may be eligible for a non-service connected pension.

I would appreciate any help that you may provide this veteran

Sincerely,

C. Choi, MD
(215) 823-4053

Pa license MD 040446 E

Appendix C